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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1428

A. H. ROBINS COMPANY, INC., *et al.*,
Petitioners,

v.

KALMAN ROSS and ANITA ROSS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

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BROWN, WOOD, IVEY,
MITCHELL & PETTY

TABLE OF CONTENTS

PAGE

Motion for Leave to File Brief *Amici Curiae* ii

Brief *Amici Curiae*

Table of Authorities vi

Preliminary Statement 1

Interest of the *Amici Curiae* 2

ARGUMENT 4

I. Where Congress Has Provided an Express Civil Remedy in the Federal Securities Laws, Resort to the General Antifraud Provisions Should Not Be Permitted By Those Who Cannot Meet the Requirements of the Express Civil Remedy 4

II. Reliance Is a Necessary Element of a Claim Based on the Antifraud Provisions of the Federal Securities Laws 12

CONCLUSION 15

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Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), Shearson Loeb Rhoades Inc. ("Shearson"), Paine, Webber, Jackson & Curtis Incorporated ("Paine Webber"), E. F. Hutton & Company Inc. ("Hutton") and Dean Witter Reynolds Inc. ("Dean Witter"), hereby respectfully move, pursuant to Rule 42 of the Rules of this Court, for leave to file the annexed brief *amici curiae* in support of the petition for a writ of certiorari. The consent of counsel for the petitioners has been obtained. Consent of counsel for the respondents has been requested and refused.

The *amici curiae* are registered broker-dealers in securities which maintain nationwide branch office systems and which participate in the underwriting of securities in nationwide syndicates. Each of the *amici* or its parent holding company is also an issuer of securities which are listed and traded upon the New York Stock Exchange. As such, the *amici* have a substantial interest in the nature and scope of liabilities that may be inferred from the antifraud provisions of the federal securities laws. In addition, certain of the *amici* are defendants in various class actions pending in several of the United States District Courts which purport to state claims under the antifraud provisions of the federal securities laws based either solely upon a "fraud on the market" theory or as an alternative basis for relief in addition to claims based upon the express liability provisions of the federal securities laws. Each of the *amici* is therefore acutely interested in having this Court resolve the questions presented by the Petition: (i) whether an action may be maintained under the antifraud provisions of the federal securities laws which would otherwise be barred or substantially restricted if it were required to be maintained under the express liability sections provided by Congress in the Securities Act of 1933, 15 U.S.C. §§77a *et seq.* (the "1933 Act"), or the Securities Exchange Act of 1934, 15 U.S.C. §§78a *et seq.* (the "1934 Act"); and (ii) whether proof of reliance is a necessary element of an action based upon the antifraud provisions of those Acts.

Broad class actions based upon the antifraud provisions of the federal securities laws, maintained without regard to the substantive provisions of the express liability provisions of those laws, continue to plague the securities industry and particularly the major broker-dealers which account for a substantial portion of all securities trading and underwriting activity.

The *amici* believe that the Court of Appeals for the Second Circuit seriously erred in permitting the maintenance of a judicially inferred right of action under Section 10(b) of the 1934 Act, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5, where plaintiffs had been provided by Congress with an express remedy under Section 18 of the 1934 Act, 15 U.S.C. §78r, with which they could not comply because of their conceded nonreliance on the filing with the Securities and Exchange Commission (the "SEC") of which they complain and because their action would have been barred by the periods of limitations provided in subsection (c) of Section 18 of the Act. It is also submitted that the Court of Appeals, in eliminating the unquestioned requirement of reliance for maintenance of an action based upon the antifraud provisions of the federal securities laws, opened the gate to a flood of massive class actions which this Court has attempted to stem. The Second Circuit's ruling, it is submitted, substantially undercuts this Court's recent decisions in *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979); *Touche Ross & Co.* v. *Redington,* 99 S. Ct. 2479 (June 18, 1979); and *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 100 S. Ct. 242 (Nov. 13, 1979).

The *amici* urge that it is appropriate for this Court unequivocally to instruct the lower federal courts that resort may not be had to the antifraud provisions of the federal securities laws where Congress has provided an express remedy for the conduct complained of and that reliance is an essential element of any claim based upon the antifraud provisions of the federal securities laws.

WHEREFORE, Merrill Lynch, Shearson, Paine Webber, Hutton and Dean Witter respectfully move this Court that

leave be granted to them to file the annexed brief *amici curiae.*

Dated: March 17, 1980

Respectfully submitted,

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TABLE OF AUTHORITIES

Cases:

PAGE

Affiliated Ute Citizens v. *United States*, 406 U.S. 128 (1972) 7, 9, 12

Blackie v. *Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976) 12n

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 8

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) ..... iv, 3, 4, 6

Chris-Craft Industries, Inc. v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973) 12n

Collins v. *Signetics Corporation*, 605 F.2d 110 (3d Cir. 1979) 15

Cort v. *Ash*, 422 U.S. 66 (1975) 6, 15

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 13

Fischman v. *Raytheon Manufacturing Co.*, 188 F.2d 783 (2d Cir. 1951) 4, 5

Globus v. *Law Research Service, Inc.*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970) 13

Healey v. *Catalyst Recovery of Pennsylvania, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶97,268 (3d Cir. Jan. 29, 1980) 15-16

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PAGE

Kissinger v. *Reporters Committee for Freedom of the Press*, 48 U.S.L.W. 4223 (U.S. March 3, 1980) 10

List v. *Fashion Park, Inc.*, 340 F.2d 457 (2d Cir.), *cert. denied sub nom. List* v. *Lerner*, 382 U.S. 811 (1965) 13

National Railroad Passenger Corp. v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974) 6

Piper v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) 12n

Rosenberg v. *Globe Aircraft Corp.*, 80 F. Supp. 123 (E.D. Pa. 1948) 8

Stern v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 603 F.2d 1073 (4th Cir. 1979) 15

Superintendent of Insurance v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971) 6-7, 9

Thiele v. *Shields*, 131 F. Supp. 15 (S.D.N.Y. 1955) 8

Titan Group, Inc. v. *Faggen*, 513 F.2d 234 (2d Cir.), *cert. denied*, 423 U.S. 840 (1975) 14

Touche Ross & Co. v. *Redington*, 99 S. Ct. 2479 (June 18, 1979) ..... iv, 3, 4, 5, 6, 11, 14

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 100 S. Ct. 242 (Nov. 13, 1979) ..... iv, 3, 5, 6, 10, 11

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PAGE

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Securities and Exchange Commission Release No. 3230 (May 21, 1942) 8n

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

Merrill Lynch, Pierce, Fenner & Smith Incorporated, Shearson Loeb Rhoades Inc., Paine, Webber, Jackson & Curtis Incorporated, E. F. Hutton & Company Inc. and Dean Witter Reynolds Inc. submit this brief as *amici curiae,* in support of the petition for a writ of certiorari, and urge this Court to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in *Ross* v. *A. H. Robins Company, Inc., et al.,* 607 F.2d 545 (2d Cir. 1979).

Interest of the *Amici Curiae*

The *amici curiae* are all registered broker-dealers in securities which maintain nationwide branch office systems and which participate in the underwriting of securities in nationwide and international syndicates. Each of the *amici* or its parent holding company is also an issuer of securities which are listed and traded upon the New York Stock Exchange. The *amici,* both as broker-dealers in actively traded securities and as issuers of such securities, have a substantial interest in the nature and scope of liabilities that may be judicially inferred from the antifraud provisions of the federal securities laws.

Moreover, currently and from time to time in the past, certain of the *amici* have been named as defendants in class actions in the United States District Courts which purport to state claims under the antifraud provisions of the federal securities laws based upon a "fraud on the market" theory. These actions purport to be brought on behalf of numerous possible claimants, such as all purchasers or sellers of a listed and actively traded security over a period of years. Typically, the representative plaintiff merely alleges that a document filed with the SEC contained material misrepresentations or omissions, but does not claim to have purchased or sold the security in reliance upon the alleged omission or misrepresentation. The "fraud on the market" theory is sometimes the sole basis for such suits and in other instances it is alleged as an alternative theory in addition to claims based upon the express civil remedies provided by Congress in the federal securities laws.

Thus, each of the *amici* is vitally interested in having this Court resolve the questions presented by the Petition: (i) whether an action may be maintained under the antifraud

provisions of the federal securities laws which would otherwise be barred or substantially restricted if it were required to be maintained under the express liability sections provided by Congress in the federal securities laws; and (ii) whether proof of reliance is a necessary element of an action based upon the antifraud provisions of the federal securities laws.

The *amici* respectfully urge this Court to issue a writ of certiorari in order to forestall the substantial and inappropriate expansion of judicially-created remedies invited by the extraordinary decision of the Court of Appeals below and thereby to call a halt to the filing of massive "fraud on the market" cases which continue to plague the securities industry.

The Second Circuit's decision cannot be squared with this Court's recent holdings in *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979); *Touche Ross & Co.* v. *Redington,* 99 S. Ct. 2479 (June 18, 1979); and *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 100 S. Ct. 242 (Nov. 13, 1979). This Court should, therefore, grant review to ensure that the frustration of Congressional intent embodied in that decision is not compounded through other courts' reliance upon it, emanating as it does from a Circuit that has often been recognized as an influential voice in this area of the law.

ARGUMENT

I.

Where Congress Has Provided an Express Civil Remedy in the Federal Securities Laws, Resort to the General Antifraud Provisions Should Not Be Permitted By Those Who Cannot Meet the Requirements of the Express Civil Remedy.

The Court of Appeals erred in permitting an action to be maintained under Section 10(b) of the 1934 Act on the basis of conduct that would constitute a violation of Section 18 of that Act. While the Court of Appeals indicated its awareness of this Court's recent decisions in *Touche Ross & Co.* v. *Redington, supra,* and *Cannon* v. *University of Chicago, supra,* it totally ignored the central theme of those decisions: that Congressional intent, as evidenced by the language employed by the Congress and, if necessary, the legislative history of the statutes, is controlling, and that judicial improvement on the legislative scheme is wholly inappropriate.

The Court of Appeals arrived at its erroneous conclusion by resurrecting the tort analysis employed by the Second Circuit almost thirty years ago in *Fischman* v. *Raytheon Manufacturing Co.,* 188 F.2d 783 (2d Cir. 1951). The Court did so despite this Court's recent repudiation of that analysis in *Touche Ross & Co.,* where this Court said that the inquiry into whether a private remedy may be inferred from a federal statute begins and ends with the statute itself, and that:

> ". . . implication of a private right of action based on tort principles, therefore, is entirely misplaced."

99 S. Ct. at 2485. In *Fischman,* the Second Circuit held that, although plaintiffs could not maintain an action under Section 11 of the 1933 Act based upon a registered public offering of securities because they had not purchased securities which were the subject of the registration statement, they could nevertheless pursue an action under Section 10(b) of the 1934 Act if they "added the ingredient of fraud" to their complaint. 188 F.2d at 787.[1] The Court based its holding on Section 286 of the Restatement of Torts and *Kardon* v. *National Gypsum Co.,* 69 F. Supp. 512 (E.D. Pa. 1946), the seminal decision utilizing tort principles (and also based upon the Restatement) to find a judicially implied cause of action under Section 10(b) and Rule 10b-5. But, just as SIPC's reliance on the tort analysis in *Touche Ross & Co.* was "entirely misplaced", so too was the Court of Appeals' reliance below upon *Fischman* v. *Raytheon Manufacturing Co.*

The Court of Appeals' error is underscored by the fact that while a petition for rehearing was pending before the Court in this case, this Court's decision in *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* was furnished to the Court of Appeals by the petitioners, but nevertheless their petition for rehearing was denied. It would appear that the Court of Appeals will continue to engage in expansive readings of the federal securities laws, contrary to

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[1] The Second Circuit's statement that the "added ingredient of fraud" is sufficient to permit a Rule 10b-5 claim to be based on a registered public offering although plaintiffs could not meet the requirements of Section 11 of the 1933 Act is unconvincing. While it is true that only negligence need be proven to recover against an issuer under Section 11, if a plaintiff in fact proves a knowing misstatement in the registration statement then, of course, the due diligence defense available to certain categories of defendants under subsection (b)(3) of Section 11 could not be sustained. Accordingly, it is unnecessary to permit overlapping and inconsistent actions to be maintained under both Section 11 of the 1933 Act and Section 10(b) of the 1934 Act.

Congress' express remedial provisions, unless this Court unequivocally states, once again, that the federal courts are required to follow the dictates of Congress as to the availability of remedies under the federal securities laws and are required to enforce the limitations, and observe the exemptions, that Congress built into the assertion of such claims. The Court of Appeals totally ignored this Court's observation in *Touche Ross & Co.*, reiterated in *Transamerica Mortgage Advisors*, that "when Congress wished to provide a private remedy it knew how to do so and did so expressly." 99 S. Ct. at 2487; 100 S. Ct. at 248.

The Court of Appeals apparently believed that it was free of Congressional restrictions because, in its view, it was not "being asked to *create* a new remedy", 607 F.2d at 553 (emphasis in original), since it was already "well established" that a private remedy existed for violations of Section 10(b) of the 1934 Act and Rule 10b-5. It viewed its task as one of determining whether a person may "invoke an established remedy in the face of a statute which may, in certain circumstances, provide another remedy for the same conduct." 607 F.2d at 553. The Court's conclusion that it could permit the Section 10(b) action to proceed without "impermissibly nullify[ing] the limitations and requirements inherent in Section 18" was arrived at because the Court did not find this Court's decisions in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974) ("Amtrak"); *Cort* v. *Ash*, 422 U.S. 66 (1975); and *Cannon* v. *University of Chicago*, *supra*, "particularly instructive", and after footnoting, but otherwise disregarding, *Touche Ross & Co.*

The Court of Appeals may have felt free to disregard this Court's opinions on the assumption that this Court had previously endorsed the proposition that a cause of action would always lie for a violation of Rule 10b-5, citing *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). 607 F.2d at 552. But *Superintendent of Insurance* and *Affiliated Ute Citizens* each dealt with a defrauded *seller* of securities in a face-to-face transaction and did not raise the issue of whether a defrauded *buyer* of securities in an open-market transaction, for whom Congress had provided express civil remedies under the federal securities laws, could also avail himself of a remedy under Rule 10b-5. It is precisely this failure to distinguish between buyers and sellers of securities and open-market versus face-to-face transactions that apparently led the Court of Appeals to its erroneous interpretation of this Court's prior decisions. It is submitted that if these distinctions are observed in determining the circumstances under which an action may be maintained under Rule 10b-5, the "casual nullification" of the limitations on the express remedies provided by Congress, which some commentators have critically noted, can be wholly avoided. *See, e.g.*, 3 L. Loss, *Securities Regulation* 1787-91 (2d ed. 1961); 6 L. Loss, *Securities Regulation* 3915-17 (1969); and 1 A. Bromberg, *Securities Law: Fraud—SEC Rule 10b-5* §2.4(2) (1977).

For example, in *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), Judge Kirkpatrick permitted the implication of a private damage remedy under Rule 10b-5 in favor of victims of an egregious scalping by corporate insiders perpetrated on the holders of the minority interest in a private company who were unaware of pending negotiations for a sale of the company's assets to National Gypsum at a substantial premium. As defrauded sellers of unlisted securities, the plaintiffs had no express remedies under the federal securities laws. In these circumstances, the Court first found that the insiders had clearly violated

the Rule[2] and then held, relying specifically on Section 286 of the Restatement of Torts, that a violation of the Rule necessarily gave rise to an action for damages cognizable in the federal courts. Judge Kirkpatrick's analysis in *Kardon* stands in sharp contrast to his later decision in *Rosenberg* v. *Globe Aircraft Corp.*, 80 F. Supp. 123 (E.D. Pa. 1948), where he prohibited the use of the more liberal venue provisions of the 1934 Act in an action allegedly based upon Rule 10b-5, but which he construed as invoking the express liability provisions of Sections 11 and 12 of the 1933 Act because the action was based upon a public offering of securities which had been registered under the 1933 Act. Whether or not Judge Kirkpatrick was initially correct in utilizing the tort analysis to provide a 10b-5 remedy to the defrauded sellers in *Kardon*, he was most assuredly correct in refusing to extend that remedy to the alleged defrauded buyer of a new issue of securities in *Rosenberg*. In *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 752 n.15 (1975), this Court itself contrasted *Rosenberg*, which refused to extend the *Kardon* tort analysis to a situation covered by an express 1933 Act remedy, with *Thiele* v. *Shields*, 131 F. Supp. 15 (S.D.N.Y. 1955), where the Court permitted a tort remedy under Rule 10b-5 in an action based upon a public offering of municipal securities although Congress had expressly exempted such securities from the registration and civil liability provisions of the 1933 Act. These citations were coupled with references to the previ-

[2] The defendants' conduct was precisely the type that the SEC intended to proscribe when it hastily promulgated the Rule in 1942. *See* 22 Bus. Law. 793, 922 (April, 1967) (remarks of Milton Freeman, one of the Rule's co-draftsmen). *See also* SEC Release No. 3230 (May 21, 1942), where the Commission stated that Rule 10b-5 was adopted to close a "loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase."

ously cited passages by Professors Loss and Bromberg, all three of which are critical of the notion that implied liabilities may broaden, or avoid the limitations of, the express civil liability provisions of the federal securities laws.

Although this Court may have "acquiesced" in *Superintendent of Insurance* in a 25-year history of "acceptance by the lower federal courts" of a judicially sponsored right of action under Section 10(b), it has never expressly acquiesced in such an action for a defrauded buyer or in respect of a publicly traded security. Thus, in *Superintendent*, this Court dealt with the sale of an insolvent insurance company's portfolio securities in the course of the looting of its assets by its unfaithful officers, and in *Affiliated Ute Citizens*, it dealt with face-to-face bargain basement sales by uninformed Indians to officers of a bank which acted as the tribe's transfer agent of the Indians' holdings of tribal securities. In granting relief under Rule 10b-5 in those situations this Court did not provide an implied remedy in addition to existing express remedies provided by Congress, nor did it make an end run around any limitations that Congress saw fit to place upon those remedies. Thus, in providing relief to the sellers in those private transactions, this Court did not do violence to the interrelated schema of the 1933 and 1934 Acts.

The questions raised by the instant Petition are quite different from those raised by those prior precedents. The Court is here presented with a unique opportunity to make clear that its prior holdings on Rule 10b-5 relate only to defrauded sellers in essentially face-to-face transactions. In so doing this Court could affirm that:

> "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done

in a particular mode, it includes the negative of any other mode.' *Botany Mills* v. *United States*, 278 U.S. 282, 289 (1929). See *Amtrak, supra*, 414 U.S., at 458; *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419; *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 471."

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 100 S. Ct. at 247. *See also Kissinger* v. *Reporters Committee for Freedom of the Press*, 48 U.S.L.W. 4223 (U.S. March 3, 1980), at 4226 & n.4. This, too, would be in keeping with the intention of Mr. Milton Freeman, who, as noted above, was one of the draftsmen of Rule 10b-5, and who recently expounded on this very point, as follows:

"In other words, the Securities Act of 1933 gave buyers of securities specific remedies; the Supreme Court so far has implied remedies under Rule 10b-5 only on behalf of sellers who, of course, had no express remedy under the Securities Act. There is some language which assumes that buyers may have an implied right under Rule 10b-5, but there have not been any cases upholding such a right. Justice Rehnquist specifically reserved this issue in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 n.15 (1975)."

M. Freeman, *The Liability of Professionals under Rule 10b-5*, 23 Pract. Law No. 4 at 45, 52 (June, 1977).

The legislative history of Section 18 of the 1934 Act, which is set forth in relevant part in the Petition, compels the conclusion that Congress wished to narrowly circumscribe the conditions under which a civil action for damages could be maintained for a deficient filing with the SEC. A proposed broad right of recovery available even to those who had not relied upon the filing (such as the respondents here) was specifically rejected by the Congress. In its stead, Congress provided for a double-barreled reliance requirement: the plaintiff must have relied upon a material misstatement in the filing, the price at which he bought or sold must have been affected by such misstatement *and* his recoverable damages are limited to those caused by his reliance on such misstatement.

Congress also rejected limitations periods which would have permitted an action to be brought within two years after the plaintiff's discovery of the misleading statement and within six years after the filing. This met with vehement objections on the basis that, in a down market, this afforded too much time for disappointed speculators to seek to transfer their losses on the basis of a fortuitous error in a previous filing. Again, Congress responded to the criticism by materially shortening the limitations periods to one year after discovery of the misstatement and within three years after the date of the filing.

All of this legislative debate and drafting has been rendered nugatory by the decision of the Court of Appeals which effectively reopened the federal courthouse doors to those who have neither relied upon a misleading filing nor brought their action seasonably. This is judicial rewriting of legislation of the baldest sort and flagrantly violates this Court's recent admonitions against judicial lawmaking. *See, e.g., Touche Ross & Co.*, at 2488; *Transamerica Mortgage Advisors, Inc.*, at 247.

The Court of Appeals' substitution of Rule 10b-5 liberality for the Congressional strictures of Section 18 of the 1934 Act should be rectified by this Court.

II.

Reliance Is a Necessary Element of a Claim Based on the Antifraud Provisions of the Federal Securities Laws.

The Court of Appeals held that "[i]n a §10(b) action, however, reliance is presumed once the materiality of an omission is established, *Affiliated Ute Citizens* v. *United States,* [406 U.S. 128 (1972)], or the material misrepresentation affected the price of stock traded on the open market". 607 F.2d at 553. In so holding, the Court of Appeals was, to our knowledge, the first to rule substantively that reliance may be presumed and thus to endorse the maintenance of an action based upon a "fraud on the market" theory.[3] Unless this decision is reversed, persons dealing in actively traded securities will continue to be subjected to unlimited class actions alleging simply that somewhere, at some time, a statement was made concerning the affairs of the issuer of a security and that such statement affected the market price of the security or "the integrity of the market". This is an open invitation to lawsuits whose dimensions are limitless and evokes the spectre of liability that Judge Cardozo foresaw in *Ultramares Corp.* v. *Touche,* 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931): "liability in an indeterminate amount for an indeterminate time

[3] The Court relied on its prior decision in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.,* 480 F.2d 341 (2d Cir.), *cert. denied,* 414 U.S. 910 (1973) (a defeated tender offeror has standing to sue for damages under Section 14(e) of the 1934 Act), which this Court subsequently reversed in *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1 (1977), and the Ninth Circuit's opinion affirming a class action determination on the basis of a rebuttable presumption of reliance, *Blackie* v. *Barrack,* 524 F.2d 891 (9th Cir. 1975), *cert. denied,* 429 U.S. 816 (1976). The subsequent reversal of *Chris-Craft Industries, Inc.* by this Court renders the Court of Appeals' prior decision of doubtful authority, and the *Blackie* opinion raised the issue only in a procedural context.

to an indeterminate class." Judge Cardozo's observation concerning such open-ended liability may aptly be repeated here:

> "The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."

255 N.Y. at 179-180, 174 N.E. at 444.

By reading reliance out of actions based on Rule 10b-5 the Court of Appeals eliminated a fundamental element of common law fraud in what is essentially a fraud action for violation of a federal statute. *See Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976). It transformed a personal action for damages for reliance upon a material misstatement or omission into a universal guarantee against market losses. It established the "scheme of investors insurance" which the Second Circuit itself had cautioned against in *List* v. *Fashion Park, Inc.,* 340 F.2d 457 (2d Cir.), *cert. denied sub nom. List* v. *Lerner,* 382 U.S. 811 (1965). The following quotation from *List* is instructive:

> "Assuredly, to abandon the requirement of reliance would be to facilitate outsiders' proof of insiders' fraud, . . . [b]ut this strikes us as an inadequate reason for reading out of the rule so basic an element of tort law as the principle of causation in fact."

340 F.2d at 463. The Second Circuit's statement in *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276 (2d Cir. 1969), *cert. denied,* 397 U.S. 913 (1970), is also apposite:

> "The [jury] instructions were sufficient to bring home the basic concept that causation must be proved else defendants could be held liable to all the world."

Cf. Titan Group, Inc. v. *Faggen,* 513 F.2d 234, 238-239 (2d Cir.), *cert. denied,* 423 U.S. 840 (1975) ("The parallel elements of materiality and reliance both serve to restrict the potentially limitless thrust of Rule 10b-5 to those situations in which there exists a causation in fact between the act and injury.")

The Court of Appeals based its broad remedy for securities traders on its perception of the "fundamental policies underlying the securities acts" and its belief that, if Congress were asked to consider the matter anew, it would concur in the need for such open-ended relief. But this Court just recently "emphasized that generalized references to the 'remedial purposes' of the 1934 Act will not justify reading a provision 'more broadly than its language and statutory scheme reasonably permit,' " *Touche Ross & Co.* v. *Redington,* 99 S. Ct. at 2490, and that it is not the function of the Courts " 'to fill any hiatus Congress has left in this area' ". 99 S. Ct. at 2490-91.

Finally, the Court of Appeals found support for its conclusion in the following policy "rationale":

> "We also believe that holding that plaintiffs must proceed under the terms of §18 because the statements were filed with the S.E.C. would encourage corporate managers to include their misrepresentations in material filed with the S.E.C., for the sole purpose of insulating themselves from liability under §10(b) and restricting the class of potential plaintiffs to the unlikely few who actually viewed and relied upon the misleading information."

607 F.2d at 556. To attribute to corporate management an intent to file false and misleading documents with the SEC, and thereby to expose themselves to criminal sanctions

under Section 32 of the 1934 Act, "for the sole purpose of insulating themselves from liability under §10(b) and restricting the class of potential plaintiffs" is a canard and nonsense. This attribution of base motives to all corporate management, we submit, exposes the dubious validity of the Court's reasoning which led it to dispense with the element of reliance, and is sufficient by itself to justify review of this unprecedented and erroneous judgment.

CONCLUSION

The *amici* respectfully urge that the Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals so that the Second Circuit, like the Fourth Circuit in *Stern* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 603 F.2d 1073 (4th Cir. 1979), the Third Circuit in *Collins* v. *Signetics Corporation,* 605 F.2d 110 (3d Cir. 1979), and the Ninth Circuit in *Jablon* v. *Dean Witter & Co.,* [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,296 (9th Cir. Feb. 29, 1980), will be required to acknowledge that "a free wheeling implication of private actions" is no longer permissible under the federal securities laws, *Stern,* 603 F.2d at 1085, that "[i]n interpreting liability provisions of [those] acts", it "must respect recent Supreme Court teachings that militate against excessively expansive readings", *Collins,* 605 F.2d at 113 and that this "Court's decisions in *Touche Ross* and *Transamerica* reflect a restrictive approach to implying private rights of action", *Jablon,* at 97,032. Judge Aldisert, whose dissent in *Cort* v. *Ash,* 496 F.2d 412 (3d Cir. 1974), was vindicated by this Court's unanimous opinion in *Cort* v. *Ash, supra,* said it best in his recent dissenting opinion in *Healey* v. *Catalyst Recovery of Pennsylvania, Inc.,* [Current] Fed. Sec. L. Rep. (CCH) ¶97,268 (3d Cir. Jan. 29, 1980):

> "For a court inferior in a judicial hierarchy to *recognize* controlling precedent announced by a superior court is not enough; the court has a responsibility to *apply* that precedent to similar facts unless it sets forth reasons for not doing so."

Healey at 96,898 (Aldisert, J., dissenting; emphasis in original).

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

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Respectfully submitted,

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